

**May 10, 1995**

**P.S. Protest No. 95-10**

**DENNIS TRUCK LINE COMPANY OF OHIO**

**Solicitation No. 150-046-95**

**DIGEST**

Protest alleging that awardee's bid for mail transportation contract was nonresponsive and the contracting officer improperly allowed the awardee to correct it after bid opening is dismissed as untimely raised; protester was aware that bid had been corrected when it received revised bid abstract more than ten working days before it submitted its protest.

**DECISION**

Dennis Truck Line Company of Ohio (Dennis) protests the award of a highway mail transportation contract to B & B Industries Inc. (B & B), alleging that the contracting officer improperly allowed B & B to change its nonresponsive bid after bid opening.

Solicitation 150-046-95 was issued on December 16, 1994, by the Allegheny Area Distribution Networks office, Pittsburgh, PA, for highway transportation of mail on an "as needed" basis between the Johnson & Hardin plant in Lebanon, OH, and either the Cincinnati, OH, Bulk Mail Center (BMC), or the Cincinnati General Mail Facility (GMF) beginning March 11, 1995, and ending September 30, 1998. The GMF trip is 37 miles; the BMC trip is 20 miles. Each trip requires extensive time for loading and unloading so that each trip includes eight hours of driver and equipment time.

Attachment 1 to the solicitation advised:

The frequency and number of trips will vary without a discernible basis on which to project an estimated frequency or estimated annual number of trips. Therefore, the Postal Service guarantees 60 trips per year. There is a potential for an estimated maximum of 600 [trips] per year. However, the only amount of trips guaranteed to the contractor is 60 per year. . . .

Paragraph 9.D. stated:

The bid price must include all elements of cost the contractor expects to incur in performing service. Bids are not to be expressed as a lump sum. All bid rates must be expressed as: Per Mile.

Three bids were opened on January 17, 1995. A bid abstract dated January 17 showed Dennis as the low bidder with a "rate bid" of \$5.90 and B & B as the high bidder with a "rate bid" of \$170,914. The contracting officer states, however, that "[w]hen bids were examined it appeared that B & B had made a mistake on their bid and submitted . . . an annual rate instead of a rate per mile." Pursuant to Procurement Manual (PM) 12.7.6 the contracting officer then sent B & B a letter informing it that he suspected a mistake was made and requesting that B & B either confirm its bid or provide evidence of any claim of mistake and, if it wished to reform its bid, of the bid actually intended.<sup>1</sup>

B & B responded, agreeing that it had made a mistake and stating that its intended bid was \$5.00 per mile, lower than that of Dennis. The contracting officer asserts that he had made an independent determination "using only information from the solicitation and B & B's bid" that B & B's intended bid had been \$5.00 per mile, and considered that "clear and convincing evidence" that the \$5.00 per mile correction should be accepted.<sup>2</sup>

On February 9, the contracting officer requested preaward information from all three bidders, enclosing a revised bid abstract of that date showing B & B's \$5.00 bid rate. (The letter sent to Dennis referred to Dennis as having submitted "the second lowest bid.") The protester submitted its preaward information on February 10. Award was made to B & B on February 16; Dennis' protest dated March 2 was received in this office March 8.

Dennis claims that it was the lowest responsive bidder and that the initial bid abstract so indicated. Dennis claims that the notice of contract award erroneously states that B & B's bid was \$5.00 per mile when the abstract shows it was \$170,914.00 per year. The protester states:

<sup>1</sup> PM 12.7.6 sets out various procedures which the contracting officer is to perform to put bidders on notice of suspected mistakes in their bids, to elicit their responses to that notice, and to evaluate those responses. Of particular relevance to this protest is 12.7.6 b.3.(a)(3):

When the bidder requests permission to correct a mistake in its bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, if such correction would result in displacing one or more lower bids, the determination may not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the solicitation and the bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw its bid may be made.

<sup>2</sup> B & B's initial calculation of its bid on an annual basis, as set out on Form 7486A, Highway Transportation Contract Bid or Renewal Worksheet, reflected a misunderstanding of the solicitation requirements. It established an annual mileage assuming that there were 600 sets of two trips, one each to the BMC and the GMF, although it would not be possible to perform 600 trips to each of the two destinations in the course of a year with the equipment and on the schedule which the solicitation requires, and B & B's worksheet did not provide enough labor hours for that many trips. The contracting officer's independent calculation incorporated the bidder's misunderstanding.

As is evident by the Abstract, B & B Industries' bid submission was in the amount of \$170,914.00. It is clear that this rate is not expressed as specifically required by the Solicitation, and the Bid Opening Committee recognized this fact when it listed Dennis as the lowest bidder at \$5.90 per mile.

The protester concludes that the contract award "must have been based upon a late modification by B & B" which was improperly accepted after the bid opening time by the contracting officer. Dennis argues that Section I.C.3. of Form 7469 would not apply because B & B's initial offer of \$170,914.00 was nonresponsive and could not have been "an otherwise successful offer."<sup>3</sup> Dennis asserts that the solicitation, which guaranteed 60 trips per year but stated the possibility of up to 600, provides no basis to derive a \$5.00 per mile rate from \$170,914.00. Dennis claims that B & B was allowed the belated opportunity to assign a number of trips to be divided into its total bid to ensure that it became the lowest bidder, and that this amounts to a "second bite at the apple," compromising the "integrity of the competitive process." The protester asks that B & B's contract be terminated and award made to Dennis.<sup>4</sup>

In his statement in response to the protest, the contracting officer asserts that B & B's "mistake" was apparent and stresses that he used information in the solicitation to determine what he thought B & B intended to bid, which was confirmed by B & B's response.

The contracting officer further contends that Dennis' protest is untimely because the February 9 letter transmitting the revised bid abstract notified it of the correction of B & B's bid. Since Dennis submitted the preaward information on February 10, Dennis proved that it had received that letter; accordingly, "Dennis knew or should have known on February 10, 1995[,] that the B & B bid had been corrected," so that its March 2 protest is untimely submitted more than ten the working days after it learned of the correction, citing PM 4.5.4 d.<sup>5</sup>

<sup>3</sup> The cover page of the solicitation stated that "[b]ids, bid modifications, and withdrawals received after the hour and date specified will be treated and considered in accordance with Section I.C.[.] of PS Form 7469." Form 7469, "Highway or Domestic Water Transportation Contract Information and Instructions," provides at I.C.1. that late bids will not be considered unless the bidder establishes that certain conditions for mailing had been met, and I.C.3. states that "a modification of an otherwise successful offer which makes its terms more favorable to the Postal Service will be considered at any time it is received and may be accepted."

<sup>4</sup> As noted above, B & B's calculations appear to be in error. Dennis' worksheet reveals its own miscalculations as well. The worksheet, expressed on a "per trip" basis, assumes 57 miles per trip requiring only 8 hours of labor. Since 57 miles is the sum of the distances of the GMF and BMC trips, each of which requires the services of one driver for eight hours, Dennis has significantly understated its costs. The worksheet of the third bidder also significantly understates labor costs associated with each trip.

<sup>5</sup> PM 4.5.4 d. states that protests other than those against defective solicitation terms "must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier; provided that no protest will be considered if received more than 15 working days after award of the contract in question."

In reply to the contracting officer's statement, the protester asserts that it learned of the award to B & B on February 23, when it received the February 16 notification of award. Dennis argues that since it is protesting the award, and it filed its protest within ten working days of receiving notification of it, its protest is timely. "In addition, Dennis' protest was clearly submitted within . . . 15 working days of the award of the contract in question."

Dennis argues that the "plain and unambiguous" solicitation terms and the PM do not permit what amounts to a "complete overhaul" of B & B's original bid. Dennis asserts that the solicitation contemplated one-way trips, and that means B & B's calculations, which included the mileage necessary to return each trip to the point of origin at the Johnson and Hardin plant, should have reflected a bid of \$2.50 per mile. According to the protester, B & B could have been allowed to withdraw its bid, but not to correct or modify it, citing PM 12.7.7 d.1., which requires rejection of "[a]ny bid that fails to conform to the essential requirements of the solicitation." In any event, the protester argues that there is no clear evidence of B & B's intent to bid \$5.00 per mile.

In rebuttal, the CO stresses that the timeliness of the protest should be measured from the date on which Dennis received the amended bid abstract. The contracting officer asserts that a vice president of Dennis called him "when he received the amended bid abstract" to ask why the abstract was revised, and that they proceeded to discuss B & B's corrected bid.

The contracting officer reiterates his arguments that even if the protest were timely, it lacks merit because the contracting officer complied with PM 12.7.6 b.'s rules concerning mistakes in bids. The contracting officer emphasizes that both B & B's mistake and its intended bid were "ascertainable substantially" from the solicitation and the bid itself, and therefore the correction was not an improper modification after bid opening.

## **DISCUSSION**

Since the requirement that a protest must be timely filed is jurisdictional, we must first determine whether Dennis' protest before this office is timely. See, e.g., *Federal Systems Group, Inc.*, P.S. Protest No. 88-12, April 26, 1988. Under PM 4.5.4 d., footnote 5, *supra.*, a protester has ten working days after learning of the basis of its protest to file that protest with this office.

On February 10, Dennis responded to the preaward questionnaire contained in the contracting officer's letter of February 9, which also contained the amended bid abstract. Dennis does not contest that it knew then that B & B's bid had been changed and that B & B had displaced it as the low bidder. A protester is "charged with knowledge of a basis for protest" when the contracting officer conveys to the protester a position adverse to the protester's interest. *Id.* A protester may not delay filing a protest until it is certain that it is in a position to detail all of the possible grounds or facts underlying its protest. *Id.*; see also *Thomas May Construction Company*, Comp. Gen. Dec. B-255683, March 23, 1994, 94-1 CPD 210 (protest untimely filed; bidder should have protested within ten working days of learning of the bids received, rather than waiting until receipt of notice of award); *Instruments for Industry, Inc.*, Comp. Gen. Dec. B-250693, February 16, 1993, 93-1 CPD 143.

To be timely, Dennis' protest would have had to have been received in this office on February 27 at the latest. As previously noted, the protest was dated March 2 and received

here March 8. This office has no authority to waive or disregard untimeliness, and may not consider the merits of any issue which has been untimely raised. *C.L. Swanson Corporation*, P.S. Protest No. 88-20, April 15, 1988; *Federal Systems Group, Inc.*, *supra*.

The protest is dismissed as untimely. In view of the fact that all bidders appear to have understated their prices per mile and that the contracting officer was, or should have been, on notice of the mistakes, the contracting officer may wish to entertain a claim for rescission of the contract for mistake after award as provided by PM 12.7.6 b.4., and to resolicit the requirement in a new solicitation.

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Contract Protests and Policies